

No. 11890

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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NATIONAL AMERICAN FIRE INSURANCE  
COMPANY OF OMAHA, a corporation,  
Appellant,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California  
Southern Division

FILED

JUN 4 - 1948

PAUL P. O'BRIEN,  
CLERK



No. 11890

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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NATIONAL AMERICAN FIRE INSURANCE  
COMPANY OF OMAHA, a corporation,  
Appellant,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California  
Southern Division

## EXHIBIT "A"

## Subrogation Receipt

\$3850.00

Received of the National American Fire Insurance Co. by the hands of Insurance Associates, San Diego, California, Agent, the sum of Thirty-Eight Hundred *and 50/100* (\$3850.00) Dollars, being in full of all claims and demands for loss and damage by falling aircraft on the September 7, 1945 day of.....19.., to the property insured by Policy No. 671102 issued at San Diego, California Agency of the Company.

And in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons or property, arising from or connected with such loss or damage (and the said Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons or property in the premises) to the extent of the amount above named.

Dated this 22nd day of September, 1945 at Lemon Grove, California.

/s/ L. CHESTER CLARK

/s/ ELIZABETH A. CLARK

[Endorsed]: Filed July 10, 1947. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and Robert Komins, Assistant United States Attorneys for the Southern District of California, and move on behalf of the defendant, United States of America, that the within action be dismissed on the following grounds:

I.

That the Complaint fails to state a claim against the defendant upon which relief can be granted.

II.

That the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim.

III.

That the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

This motion is based and will be presented upon the records, files and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant.

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MILLER, HIGGS, FLETCHER & GLEN,  
JOHN W. HOLLER,  
726 Bank of America Bldg.,  
San Diego 1, Calif.

For Appellee:

JAMES M. CARTER,  
United States Attorney,  
CLYDE C. DOWNING,  
ROBERT KOMINS,  
Assistants U. S. Attorney,  
600 U. S. Post Office and  
Court House Bldg.,  
Los Angeles 12, Calif. [1\*]

In the District Court of the United States, Southern  
District of California, Southern Division

No. 872—Civil

NATIONAL AMERICAN FIRE INSURANCE  
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### COMPLAINT

Plaintiff complains of defendant and alleges:

#### I.

At all times herein mentioned, plaintiff was a corporation duly organized and existing, and licensed to do and doing business in the State of California as a fire insurance company.

#### II.

Prior to the 7th day of September, plaintiff issued a certain policy of insurance to L. Chester Clark and Elizabeth A. Clark, husband and wife, under the terms of which policy, plaintiff agreed with the said L. Chester Clark and Elizabeth A. Clark to insure a certain dwelling house, located at 4770 Judson Way, San Diego, California, the property of said L. Chester Clark and Elizabeth A. Clark; that said policy provided, among other things, that plaintiff would insure the said L. Chester Clark and Elizabeth A. Clark up to the sum of Four Thousand Dollars, [2] (\$4,000.00), against damage caused by aircraft or fire, and that should said



dwelling house be damaged by reason of falling aircraft or by fire, this plaintiff would pay the said L. Chester Clark and Elizabeth A. Clark for the loss or damage to the said dwelling house, up to the sum of \$4,000.00; that said policy of insurance was in full force and effect on the 7th day of September, 1945.

### III.

That on the 7th day of September, 1945, Frank H. Dean, Jr., was a commissioned officer in the United States Navy, to wit, a lieutenant, and that he was on said date, attached to the United States Naval Auxiliary Air Station, Brown Field, San Diego County, California, and that on said date, and while he was acting in the line of duty, operating and flying a certain airplane belonging to the defendant herein, the said Lieutenant Frank H. Dean, Jr., piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with and strike the said dwelling house, belonging to the said L. Chester Clark and Elizabeth A. Clark, thereby injuring, damaging and destroying the same by such crash and collision and a resultant fire immediately occasioned thereby.

### IV.

That as a direct and proximate result of said careless, negligent and reckless piloting and operating of said airplane, as aforesaid, the said dwelling house belonging to L. Chester Clark and Elizabeth A. Clark was damaged in the sum of Three Thousand Eight Hundred and Fifty Dollars (\$3,850.00).

## V.

By reason of said policy of insurance as aforesaid, and by reason of the damage to said dwelling house as aforesaid, plaintiff [3] became obligated to and did pay to the said L. Chester Clark and Elizabeth A. Clark, the sum of \$3,850.00, which was then and there and is the amount of damage to the property insured under the terms of the aforementioned policy.

## VI.

That on the 22nd day of September, 1945, the said L. Chester Clark and Elizabeth A. Clark did assign to plaintiff, each and all claims and demands against any person, persons or property arising from or connected with the above-mentioned loss and damage to the extent of the sum of \$3,850.00; that a copy of said assignment is attached hereto, marked "Exhibit A," and made a part hereof by reference.

Wherefore, plaintiff prays judgment against said defendant, for the sum of \$3850.00, together with court costs, and that in the event the court renders a judgment herein in favor of plaintiff, that the court, as a part of said judgment, allow reasonable attorneys' fees in accordance with the provisions of and as provided by Section 422 of the Federal Tort Claims Act.

MILLER, HIGGS, FLETCHER  
& GLEN and

JOHN W. HOLLER,

By /s/ JOHN W. HOLLER. [4]

State of California,  
County of San Diego—ss.

John W. Holler, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in San Diego, San Diego County, California, and is one of the attorneys for plaintiff in the above-entitled matter; that plaintiff is a corporation and none of its officers are within the County where plaintiff's attorneys have their office, and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on information or belief; and as to those matters that he believes it to be true.

/s/ JOHN W. HOLLER.

Subscribed and sworn to before me this 12th day of July, 1947.

/s/ [Illegible]

Notary Public in and for the  
said County and State.

## EXHIBIT "A"

## Subrogation Receipt

\$3850.00

Received of the National American Fire Insurance Co. by the hands of Insurance Associates, San Diego, California, Agent, the sum of Thirty-Eight Hundred *and 50/100* (\$3850.00) Dollars, being in full of all claims and demands for loss and damage by falling aircraft on the September 7, 1945 day of.....19.., to the property insured by Policy No. 671102 issued at San Diego, California Agency of the Company.

And in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons or property, arising from or connected with such loss or damage (and the said Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons or property in the premises) to the extent of the amount above named.

Dated this 22nd day of September, 1945 at Lemon Grove, California.

/s/ L. CHESTER CLARK

/s/ ELIZABETH A. CLARK

[Endorsed]: Filed July 10, 1947. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and Robert Komins, Assistant United States Attorneys for the Southern District of California, and move on behalf of the defendant, United States of America, that the within action be dismissed on the following grounds:

I.

That the Complaint fails to state a claim against the defendant upon which relief can be granted.

II.

That the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim.

III.

That the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

This motion is based and will be presented upon the records, files and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant.

## NOTICE OF MOTION

To: The plaintiff above named and Miller, Higgs, Fletcher & Glen & John W. Holler, its attorneys:

You and each of you will please take notice that the defendant, United States of America, by and through the undersigned, will bring the above and foregoing motion on for hearing before the above-entitled Court in the Courtroom of the United States District Court in the United States Customs and Court House, 325 West "F" Street, San Diego, California, on Monday, November 10, 1947, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated at Los Angeles, California, this 30th day of October, 1947.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 31, 1947. [9]

In the District Court of the United States in  
and for the Southern District of California,  
Southern Division

No. 872—Civil

NATIONAL AMERICAN FIRE INSURANCE  
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEED-  
INGS ON MOTION OF DEFENDANT TO  
DISMISS

San Diego, California, November 10, 1947

10:00 A.M.

Appearances:

For the Plaintiff: Miller, Higgs, Fletcher & Glen;  
by John W. Holler, Esq.

For the Defendant: Robert Komins, Esq. [11]

The Court: I think I can save you a great deal  
of time. I am of the view that this statute, being  
in derogation of the sovereignty, does not apply  
except to the individuals themselves. It does not  
apply to subrogated claims, because the Congress  
of the United States did not say so.

Mr. Holler: I realize it is a close question. It  
is my understanding that there is now on appeal,



to the Circuit Court of Appeals, a decision from a department of this court, wherein a judge in Los Angeles held according to the statement your Honor has just made.

I would suggest, if it meets with the approval of this Court, that this matter go off calendar pending the outcome of that appeal. Then, if that appeal is such that it indicates we have no standing in court, that will settle it once and for all. If, on the other hand, the decision of the Los Angeles court should be reversed, then we would have, I believe, a good cause of action. There is in this particular complaint an allegation of an assignment. The assignment undoubtedly is void under the statute, but in that case we contend it should be, and could be, treated as surplusage. I would therefore ask that this be postponed until the outcome of the appeal.

The Court: That appeal would not decide this question, [12] because the court might refuse to allow the person to intervene as a party in interest, on other grounds. You know how the higher courts are. They don't rule on the merits unless they have to.

In the first place, permission to intervene is not obligatory. The court may allow a person who has an interest to intervene, and the court might decide that case upon the proposition, regardless of the ground the court took, that it was not the court's province to allow another person to intervene in the action.

Mr. Holler: I am not familiar with the proceeding taken up there.



The Court: It is right here. They have attached it to the memorandum. It says, "leave to intervene as parties plaintiff in this action be and is hereby denied." "Intervene" does not mean "substitution." It means "intervenire,"—to come between. The right to intervene is not obligatory. Therefore, the opinion of Judge Mathes might be sustained upon that ground, without getting down to the proposition involved. Here we have a subrogee suing in his own right.

Mr. Holler: On the contrary, it might be that this very point will be decided.

The Court: When I am satisfied that my decision is right, I never postpone a matter to await the decision of [13] the higher courts.

For instance, to show you my attitude, a gentleman whom you all know, J. Edward Keating, an old-time practitioner, years ago induced two judges of the District Court to say that a certain statute does not provide a penalty. The cases were appealed, but an Eastern Circuit repudiated them, and in an opinion in which certiorari was denied, the court held that the statute does provide a penalty, and was valid.

Recently one of our judges, because he was not bound to follow the Circuit, ruled to the contrary. In other words, he held these two decisions, one by Judge Trippett, expressed his view.

I have declined to continue any of the cases involving the same offense, in my court, because I do not agree with the opinion of the other judges. In other words, all judges of our court are respon-

sible for their own rulings, unless we agree, as a policy of the court, we should make a certain ruling, and then we are bound by that ruling, whether we agree with it or not. Because of my policy, and also because Judge Mathes' case may be decided on another point, I decline to follow it. You cannot be harmed by this, because it does not cut off the statute of limitations. You will be protected. As a matter of fact, I have held that you can choose whichever statute you want,—one year from January, 1946, or a year from August 2, 1946, which is the date it [14] went into effect.

Mr. Komins: The statute would run in this case, your Honor.

Mr. Holler: Yes, it is my understanding that the statute ran the 2nd of August, of this year.

The Court: The statute would not run if you protected your rights by instituting an appeal, and ran it along. The statute does not run against the action of the court erroneously dismissing a case.

Mr. Holler: I presume, in view of your Honor's remarks, your Honor has made some study of this section. I have no authorities. As you know, there has not been an interpretation on this point.

The Court: I am familiar with the proposition. The same principle has been applied right along. This is a deviation, not of the common law, but a deviation from the governmental principle that the government cannot be sued except with its own consent. Whether we deal with any of the acts, beginning with the Federal Tort Claims Act, the Tucker Act, or the Miller Act, which were all acts

which gave persons the right to sue, courts have held that only the persons specifically named have the right. That others, deriving from them either by agreement or otherwise, are not covered by the Acts. I could write an opinion that would cover 15 pages, and probably give you 50 citations, and reiterate what the French call *verite a la Palisse*. And that is a well known and accepted principle.

Mr. Holler: I would like to point out this portion of the statute, if the Court please. As you know, it is provided that in certain cases that the United States is liable for tort claims, and it goes on to say that the government shall be liable "on account of damage to, or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury," etc.

Not the person who was injured, but the claimant. We are in this case the claimant, the subrogee, and under the law of the State of California we are automatically substituted in the shoes of the injured party.

The Court: I think Mr. Komins made exactly the same argument in favor of the proposition that the statute of limitations of the State of California should apply. I ruled that that was merely a general statement, which does not make the law of California binding upon us, because when we are

dealing with relations between the sovereign and the individual, the only law that governs is the law of the United States. The law of negligence, or lack of negligence, or contributory [16] negligence, would be governed by the law of the forum. But the right of anyone to sue is governed, just as the statute of limitations is governed, by what the statute says, and only those persons who are specifically authorized to sue can sue. That clause is not broad enough to write in the law of the State of California, because if that were true my opinion in the other case would be incorrect.

Mr. Holler: There is one point which I respectfully suggest your Honor overlooks. That is, the statute does not say the injured party may sue. It says the claimant. If the United States would be liable as a private person, under the laws of this jurisdiction, then the United States is liable in this case. As I say, we are the claimant here.

Mr. Komins: If the Court please, plaintiffs have filed a memorandum in this matter, where they admit the Federal Tort Claims Act does not expressly grant consent to sue by the claimant. In the case of *United States vs. Sherwood*, 312 U.S., 584, the court pointed out that it is not a matter of procedure, but of jurisdiction. There is no language in the Act itself which permits a suit by a subrogee or an assignee. I would like to point out that in the case of *Offer vs. Superior Court*, 194 Cal., 114, which counsel for the plaintiff has cited in his memorandum, the court treated the subrogee as a sort of assignee by equity. There is no difference so far as the statute is concerned. So we have

the [17] double objection, both as to the strict construction of a waiver of immunity, as well as a violation of the anti-assignment statute, which counsel admits is objectionable, and will eliminate that theory of the case from his complaint. There is no consent by the government to be sued by anybody but the party himself.

Mr. Holler: I respectfully submit that is not what the statute says.

Mr. Komins: Further reference to the Sherwood case indicates that the Federal Rules of Civil Procedure do not delegate any substantive rights against the government, despite any wording in the Tort Claims Act. It does not enlarge any right against the government, to which it has not consented. Your Honor is well acquainted with the cases which hold that District Courts are courts of limited jurisdiction, and where no jurisdiction exists it cannot be conferred on the court, even with the consent of the parties. And this is strictly a jurisdictional question.

The Court: In the opinion to which I referred, *Sweet vs. United States*, 71 Fed Sup., 863, I said:

“This statute is the Government’s consent to be sued in certain actions where heretofore action would not lie against it.”

Then I refer to the very section read to me, saying

“Subject to the provisions of \* \* \* the same [18] claimants, in the same manner, and to the same extent as a private individual under like circumstances,”

and I point to the fact:



“This paragraph followed the paragraph which gave jurisdiction to the United States District Courts to such actions accruing on and after January 1, 1945,”

And I state:

“Counsel for the Government would take a portion of Section 410 and tie this action to the California statute of limitations, which, for torts, is one year.”

Then I hold why in my opinion this is not so, because the Congress has provided a Statute of Limitations, and this section does not enlarge jurisdiction. It says:

“Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, occurring on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligence or wrongful act or omission of any employee of the [19] Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage,

loss, injury, or death in accordance with the law of the place where the act or omission occurred.”

So it clearly contemplates an individual action by a person who is actually damaged. Subrogation is a statutory creation.

In view of the specific provision which repudiates assignments, and certainly indirect assignment allowed by equity would also be included in that,—the motion to dismiss will be granted. [20]

### Certificate

I hereby certify that I am duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of January A.D., 1948.

/s/ HENRY A. DENING,  
Official Reporter.

[Endorsed]: Filed Jan. 27, 1948. [21]

[Title of District Court and Cause.]

### ORDER DISMISSING ACTION

The within cause having come on for hearing on November 10, 1947, at ten o'clock a.m., on defendant's motion to dismiss the within action on the

following grounds, to wit: (1) that the Complaint fails to state a claim against the defendant upon which relief can be granted, (2) that the Federal Tort Claims Act (28 U.S.C., § 921, et seq.) does not authorize the maintenance of suits upon a derivative claim, and (3) that the Anti-Assignment Statute (31 U.S.C.A., § 203) forbids this action which was brought by an insurance company subrogee and assignee.

And the Court having heard the argument of counsel and being fully advised finds that the defendant's motion to dismiss upon the aforementioned grounds, and each of them, is well taken and that it should be granted.

It is, therefore, hereby ordered, adjudged and decreed that the defendant's motion to dismiss, above referred to, be and it is hereby granted, and that the within action be and the same is hereby dismissed.

Dated: November 21, 1947.

/s/ LEON R. YANKWICH,

United States District Judge.

Approved as to form, pursuant to Rule 7, Local Rules, Southern District of California.

MILLER, HIGGS, FLETCHER  
& GLEN and

JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for Plaintiff.

[Endorsed]: Filed and Judgment entered Nov. 21, 1947. Docketed Nov. 26, 1947; book 13, page 33.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that National American Fire Insurance Company of Omaha, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District, from the final judgment entered in this action on November 21, 1947, and from the whole of said judgment.

Dated: January 14, 1948.

MILLER, HIGGS, FLETCHER  
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for said Plaintiff.

[Endorsed]: Filed and copy mailed to James M. Carter, U. S. Attorney, Feb. 24, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD PROCEEDINGS  
AND EVIDENCE TO BE CONTAINED IN  
RECORD ON APPEAL

To Edmund L. Smith, Clerk of the Above-Entitled  
Court:

Please take notice that Plaintiff, National American Fire Insurance Company of Omaha, has appealed to the Circuit Court of Appeals for the Ninth District from that certain final judgment entered in this action on November 21, 1947, and from the whole of said judgment;

And it is hereby requested that you prepare, or cause to be prepared a record on Appeal in the above-entitled cause, including therein the Judgment Roll, Plaintiff's Complaint, Defendant's Motion to Dismiss, the Order of the above-entitled Court dismissing said action, the Notice of Appeal and this Notice.

Dated: February 21, 1948.

MILLER, HIGGS, FLETCHER  
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER,

Attorneys for said Plaintiff.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 24, 1948. [25]

[Title of District Court and Cause.]

APPELLEE'S COUNTER-DESIGNATION OF  
ADDITIONAL PORTIONS OF THE REC-  
ORD, PROCEEDINGS AND EVIDENCE  
TO BE INCLUDED IN RECORD ON AP-  
PEAL

The plaintiff-appellant, National American Fire Insurance Company of Omaha, having heretofore filed a designation of record, proceedings and evidence to be contained in record on appeal, the defendant-appellee, United States of America, hereby designates the following additional portions of the record, proceedings and evidence to be included in the record on appeal:

1. Reporter's Transcript of Proceedings of November 10, 1947, on motion of defendant to dismiss.
2. This counter-designation.

JAMES M. CARTER,

United States Attorney,

CLYDE C. DOWNING and

ROBERT KOMINS,

Assistant U. S. Attorneys,

By /s/ ROBERT KOMINS,

Attorneys for Defendant-Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 8, 1948. [27]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain full, true and correct copies of Complaint; Motion to Dismiss; Reporter's Transcript of Proceedings on Motion to Dismiss; Order Dismissing Action; Notice of Appeal; Designation of Record on Appeal and Counter-Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the notation of the filing of the Order Dismissing Action was made in the civil docket on November 26, 1947.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of April, A.D. 1948.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy Clerk.

[Endorsed]: No. 11890. United States Circuit Court of Appeals for the Ninth Circuit. National American Fire Insurance Company of Omaha, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed April 2, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11890

NATIONAL AMERICAN FIRE INSURANCE  
COMPANY OF OMAHA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON AP-  
PEAL

Appellant intends to rely upon the following points on the Appeal of the above-entitled cause:

I.

That the District Court of the United States, in and for the Southern District of California, Southern Division, erred in dismissing appellant (plaintiff's) complaint for the following reasons:

- (a) Said complaint states a good and sufficient cause of action against defendant.
- (b) That the Federal Tort Claims Act (28 U.S.C., Sec. 921 et seq.) does authorize the maintenance of suits upon a derivative claim.
- (c) The Anti-Assignment Statute (31 U.S.C.A. 203) has no application to the claim of a subrogee under the Federal Tort Claims Act.

Dated this 6th day of April, 1948.

MILLER, HIGGS, FLETCHER  
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant hereby designates the entire record as certified to you as necessary for the consideration of this appeal, and requires that you cause the entire transcript of such record to be printed.

Dated this 6th day of April, 1948.

MILLER, HIGGS, FLETCHER  
& JOHN W. HOLLER,

By /s/ JOHN W. HOLLER.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 8, 1948.







